FILED
AUG 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUIS HEIMBACH, individually and as the Orange County Executive; PETER REPLOGLE, individually and as the Director of the Orange County Employment and Training Administration; JUNE COOK, individually and as former Director of the Orange County Employment and Training Administration; LAWRENCE GASKINS, individually and as an employee of the Orange County Employment and Training Administration and the COUNTY OF ORANGE,

Petitioners,

—against—

HUDSON VALLEY FREEDOM THEATRE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Dated: New York, N.Y.
August 18, 1982

Table of Contents

Page

Table of Cases and Authorities . . . ii

REASONS FOR DENYING THE WRIT 2

ARGUMENT

I. THE QUESTION OF CORPORATE RACIAL IDENTITY NEED NOT BE DETERMINED 3

II. THERE IS NO CONFLICT IN THE CIRCUITS OVER THE QUESTIONS RAISED BY PETITIONERS 6

III. CORPORATIONS ARE ENTITLED TO EQUAL PROTECTION AND DUE PROCESS OF LAW 9

IV. PETITIONERS' POSITION WOULD ENCOURAGE UNNECESSARY LITIGATION AND INVERT TRADITIONAL STANDING TESTS . . .12

CONCLUSION 15

Table of Cases and Authorities

Case	Page
Advocates for the Arts v. Thomson, 532 F. 2d 792 (1st Cir. 1976)	10
Barrows v. Jackson, 346 U.S. 249	4
Buchanan v. Warley, 245 U.S. 160	4
Erlich v. Glasner, 418 F. 2d 226 (9th Cir. 1969)	14
First National Bank of Boston v. Bellotti, 435 J.S. 765	11
Fulton Market Cold Storage Co. v. Cullerton, 582 F. 2d 1071 (7th Cir. 1978)	9
Gordon v. City of Cartersville, Georgia, 522 F. Supp. 753 (N.D. Ga. 1981)	8
Howard Security Services, Inc. v. Johns Hopkins Hospital, 516 F. Supp. 508 (D.C. Md. 1981)	7
Hudson Valley Freedom Theatre v. Heimbach, 671 F. 2d 702 (2d Cir. 1982)	13,14
Marshall v. Kleppe, 637 F. 2d 1217 (9th Cir. 1980)	6

Case — Page

McDonald v. Santa Fe Trail Transporation Company, 427 U.S. 273, 295 4

Monell v. Department of Social Services of the City of New York, 436 U.S. 678 5

Roslindale Co-Op Bank v. Greenwald, 481 F. Supp. 749 (D.C. Ma. 1979). . 10

Santa Clara County v. Southern Pacific R.R. Co., 118 U.S. 394. 9

Smith v. Martin, 542 F. 2d 688 (6th Cir. 1976) . . . 14

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 4

T. and S. Service Associates, Inc. v. Crenson, 505 F. Supp. 938 (D.C.R.I. 1981). . 6

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 253, 263 2,6,7,8

Other Authorities

Civil Rights Act of 1964; Title VI, §601:

42 U.S.C. §2000d 7
42 U.S.C. §1981 4,7
42 U.S.C. §1983 5,7,8,10

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
No. _____

LOUIS HEIMBACH, et al.,
Petitioners,
-against-
HUDSON VALLEY FREEDOM THEATRE, INC.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Hudson Valley Freedom Theatre, Inc., by its undersigned counsel, pursuant to Rule 22 of this Court, respectfully opposes the Petition for a Writ of Certiorari submitted by Herbert Dicker, Esq., on behalf of petitioners, to review the judgment of the United States Court of Appeals for the Second Circuit in this case. Leave to submit the within Brief in Opposition, by August 19, 1982, has been granted by Honorable Alexander Steves, Clerk of the Court.

REASONS FOR DENYING THE WRIT

Introduction

Petitioners ask this Court to rule that corporations are without standing to maintain suits for acts of racial discrimination. This proposed determination is unnecessary, unsupported, and unwise. The single line of dicta upon which petitioners premise their argument */ has not and need be read so as to work a radical reinterpretation of traditional standing tests and the purpose of the thirteenth and fourteenth amendments and the civil rights laws.

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*/ "[A] corporation, as a faceless creature of the state, may not assert claims of racial discrimination on its own behalf and cannot be the target of racial discrimination." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 253, 263.

ARGUMENT

I. THE QUESTION OF CORPORATE RACIAL IDENTITY NEED NOT BE DETERMINED.

Petitioners' writ may be denied without reaching the issue of corporate racial identity. Hudson Valley Freedom Theatre, Inc. (HVFT) may maintain an action for racial discrimination, even if its technical lack of racial character is assumed. The fundamental right to be free from official racial discrimination, as embodied in the thirteenth and fourteenth amendments and civil rights laws, gives HVFT standing to seek redress for racially motivated wrongs which have caused it direct injury.

This Court, as Justice Pierce noted in his concurring opinion below, has repeatedly held that all persons may invoke the powers of the civil rights laws when

injured by state-sanctioned racial animus. Thus, in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237, the Court held that a white person had standing to sue when "punished for trying to vindicate the rights of minorities." McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273, 295, holds that 42 U.S.C. §1981 was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." See also Barrows v. Jackson, 346 U.S. 249.

A possible absence of racial identity will not, therefore, deprive a corporation of standing in matters of racial discrimination. The civil rights laws and the thirteenth and fourteenth amendments were enacted to eliminate state-sanctioned racial discrimination. Buchanan v. Warley,

245 U.S. 60. In construing the reach of 42 U.S.C. §1983, this Court has noted the words of Representative Shellaberger, one of the drafters of the civil rights laws:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous, were this not the rule of interpretation. As has been again and again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all people. . . Chief Justice Jay and also Story say: 'Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally and it is generally adopted in the interpretation of laws. 1 Story on Constitution, §429.

Globe App. at 68. Cited in Monell v. Department of Social Services of the City of New York, 436 U.S. 678, 683.

II. THERE IS NO CONFLICT IN THE CIRCUITS OVER THE QUESTIONS RAISED BY PETITIONERS.

Five years have elapsed since the decision in Arlington Heights. Yet, petitioners are unable to point to, and respondent has been unable to find, a single case in which the dictum cited by petitioners has stripped a corporation of standing in a civil rights suit. Every court which has considered the issue has found a basis for corporate standing.

Marshall v. Kleppe, 637 F. 2d 1217 (9th Cir. 1980) held that a corporation had standing to sue the Small Business Administration for claimed racial discrimination. T and S Service Associates, Inc. v. Crenson, 505 F. Supp. 938 (D.C.R.I. 1981) found that a corporation (though not its Black shareholders) had standing to sue for racial bias under 42 U.S.C.

§§1981, 1983 and 2000d.*/ The court in Howard Security Services, Inc., v. Johns Hopkins Hospital, 516 F. Supp. 508 (D.C. Md. 1981) was uncertain of corporate standing under 42 U.S.C. §1981, but noted this would rarely be a critical problem because a corporate action would always be

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*/ Respondent has also sued under 42 U.S.C. §2000d. This statute, which was not at issue in Arlington Heights, states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." As the court below declared, there is no reason to believe that corporations are outside the protection of this statute.

proper under 42 U.S.C. §1983. Gordon v. City of Cartersville, Georgia, 522 F. Supp. 753, 757 (N.D. Ga. 1981), declared that a white partnership had standing to sue under the civil rights laws because of "its own right to be free from injury generated by the defendant's racially motivated conduct."

The Second Circuit's decision is consistent with that of all other post Arlington Heights tribunals which have faced the question of corporate standing in civil rights suits. The Court is not obliged to further address a non-existent controversy.

III. CORPORATIONS ARE ENTITLED TO EQUAL PROTECTION AND DUE PROCESS OF LAW.

Since Santa Clara County v. Southern Pacific R.R. Co., 118 U.S. 394, corporations have enjoyed the protection of the fourteenth amendment. It is now black-letter law that:

> [A] corporation is a 'person' within the meaning of the equal protection and due process of law clauses of the Fourteenth Amendment, Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936); Adams v. City of Park Ridge, 293 F. 2d 585 (7th Cir. 1961); Advocates for Arts v. Thompson, 532 F. 2d 792 (1st Cir. 1976); Raymond Motor Transportation, Inc. v. Rice, 417 F. Supp. 1352 (3-judge Dist. Ct. W.D. Wisc. 1976). Accordingly, Fulton, the corporate plaintiff, may maintain a §1983 action to secure the protection and guarantees accorded to it under the Fourteenth Amendment.

Fulton Market Cold Storage Co. v. Cullerton, 582 F. 2d 1071, 1079 (7th Cir. 1978).

Under the aegis of the fourteenth amendment and 42 U.S.C. §1983, corporations have brought suit for everything ranging from a claimed denial of due process in bank certification procedures (Roslindale Co-op Bank v. Greenwald, 481 F. Supp. 749 (D.C. Ma. 1979)) to alleged discrimination for printing a poem entitled "Castrating the Cat." (Advocates for the Arts v. Thomson, 532 F. 2d 792 (1st Cir. 1976)).

Petitioners now ask this Court to hold, however, that a corporation, because of its artificial character, may not utilize the fourteenth amendment and civil rights laws, to combat racial discrimination -- the very evil which the statutes seek to prevent. Petitioners contend that "Race and color are but two of the inherently personal characteristics for which only natural persons may suffer direct

injury." (Petition for Certiorari at 9). This argument is without merit. A corporation cannot literally "speak" (any more than it can literally have a race) yet it has a constitutional right to free speech (First National Bank of Boston v. Bellotti, 435 U.S. 765). To assert that an artificial "person" may not be the victim of racial discrimination is akin to saying that the tin man in The Wizard of Oz couldn't be hurt because he didn't have a heart.

IV. PETITIONERS' POSITION WOULD ENCOURAGE UNNECESSARY LITIGATION AND INVERT TRADITIONAL STANDING TESTS.

The tests for standing set forth by this Court are best satisfied by allowing a corporation which has suffered harm as a result of racial discrimination to seek redress in its own right. Petitioners' arguments in this regard are puzzling since they concede that

> Significantly, absent special circumstance, '[a litigant] must assert his own legal interests rather than those of third parties.' Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (citations omitted). '. . . [T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' Warth v. Seldin, 422 U.S. 490, 499 (1975) (citations omitted).

Petition for Certiorari at 11.

As the court below held:

> HVFT is in a better position than anyone else to challenge discriminatory practices leading to cutting its grant funds. In addition, HVFT has a far more solid claim of injury in fact than would any resident who would have to allege an interest in attending as yet unannounced productions, or a prospective employee who might be only one of many that would seek to apply for positions not yet offered as a result of ETA's denial of the grant. It would indeed be paradoxical if prudential standing considerations were to limit the range of permissible plaintiffs in a case like this to those who would be required to file complaints indulging in the sort of speculation which the Court has found suspect under its constitutional standing analysis. See Warth v. Seldin, supra, 422 U.S. at 502-08.

Hudson Valley Freedom Theatre v. Heimbach, 671 F. 2d 702 (2d Cir. 1982) at 709.

Additionally, should petitioners' standing test be adopted, a corporation, owned entirely by Black shareholders, would be without remedy for acts of racial

animus directed against the corporation. The shareholders would be barred from maintaining an action because the damage was to the corporation (Smith v. Martin, 542 F. 2d 688 (6th Cir. 1976); Erlich v. Glasner, 418 F. 2d 226 (9th Cir. 1969)), and the corporation could not sue because of its purported lack of racial identity. As Judge Friendly noted (Hudson Valley at 706), this would be a most anomalous result.

Moreover, there is little reason to suspect that a corporation so injured would not avail itself of other litigation devices. Encouraging a corporation to resort to artificial third-party plaintiffs is a distinctly unuseful approach to standing.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,*/

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August 18, 1982

*/ Counsel wish to acknowledge the valuable assistance of Michele Chandler, a second year law student at New York University School of Law, and Joan L. Washington, Legal Worker at the Center for Constitutional Rights, in the preparation of this brief.